

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

GAREY SMITH,

Petitioner(s),

vs.

WARDEN, SOUTHERN OHIO  
CORRECTIONAL FACILITY,

Respondent(s).

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Case Number: 1:07cv977

Chief Judge Susan J. Dlott

ORDER

This matter is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Timothy S. Black. Pursuant to such reference, the Magistrate Judge issued an Order resolving petitioner's non-dispositive motions (Doc. 53). The Magistrate Judge also reviewed the pleadings and filed with this Court on July 9, 2009 a Report and Recommendation to deny petitioner's amended habeas petition with prejudice (Doc. 54). Subsequently, the petitioner filed objections to both the Order (Doc. 58) and the Report and Recommendation (Doc. 62).

The Court has reviewed the petitioner's non-dispositive motions (Doc. 20, 26, 28, 31, 41, 43, 45, 47, 49, 50 and 51), the Magistrate Judge's Order on those motions and petitioner's objection thereto. Petitioner has not shown that the Magistrate Judge's Order on the non-dispositive motions was clearly erroneous or contrary to the law. The Court therefore declines to reconsider those motions.

With respect to the Report and Recommendation, the Court has reviewed the

comprehensive findings of the Magistrate Judge in the Report and Recommendation, considered de novo all of the filings in this matter. Upon consideration of the foregoing, the Court does determine that such Recommendation should be adopted.

Accordingly, petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, as amended (*see* Docs. 1, 25, 33) is **DENIED** with prejudice.

A certificate of appealability will not issue on any of the claims alleged in Grounds "B" and "C" of the petition that are waived and thus procedurally barred from review, because under the first prong of the two-part standard enunciated in *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000), "jurists of reason" will not find it debatable whether the Court is correct in its procedural ruling.

A certificate of appealability also will not issue with respect to the double jeopardy claims alleged in Ground "A" and a portion of Ground "B", the claims alleged in Grounds "B" and "D" challenging petitioner's sentences, the claim alleged in Ground "B" challenging the trial court's refusal to give a lesser offense instructions, and the defaulted judicial misconduct claims alleged in Ground "C". Reasonable jurists will not find it debatable whether any of these claims should have been resolved in a different manner or, alternatively, whether the issues presented are "adequate to deserve encouragement to proceed further." *Miller v. El-Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack*, 529 U.S. at 484); *see also* 28 U.S. C. § 2253( C ); Fed. R. App. P. 22(b).

A certificate of appealability, however, will issue with respect to the defaulted prosecutorial misconduct claim alleged in Ground "C", which was addressed on the merits herein, because reasonable jurists will find it debatable whether that claim should have been resolved in a different matter. *See id.*

With respect to any application by petitioner to proceed on appeal *in forma pauperis*, the Court will certify pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of any Order adopting this Report and Recommendation will be taken in “good faith,” and therefore, **GRANT** petitioner leave to proceed on appeal *in forma pauperis* upon a showing of financial necessity. *See* Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6<sup>th</sup> Cir. 1997).

Petitioner’s motions to further supplement the record (Docs. 55 and 56) are **DENIED AS MOOT**.

IT IS SO ORDERED.

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s/Susan J. Dlott  
Chief Judge Susan J. Dlott  
United States District Court